

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found Respondent's request for Review and Modification should be denied as there was no showing of a change in circumstances. Specifically, the ALJ found Claimant's alleged failure to complete a job placement plan implemented by Respondent following entry of the Award dated May 17, 2002 did not constitute a lack of a good faith effort to seek appropriate employment as required by Kansas law. Thus, there had been no change in circumstances to warrant a change in the Award.

The Respondent requests review of the ALJ's denial of Respondent's request for Review and Modification.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The facts pertinent to this case are fully set forth in the ALJ's Award and need not be repeated herein. Suffice it to say, Respondent contends Claimant failed to participate in a job placement plan and had she done so, she would most certainly have obtained employment that would pay her 90% or more of her pre-injury wage, thus negating any entitlement to work disability under K.S.A. 44-510e(a). According to Respondent, Claimant's failure to cooperate constitutes a change in circumstances such that the underlying Award should be decreased pursuant to K.S.A. 44-528(a) to reflect a functional impairment only.

Claimant maintains there has been no change in circumstances and that she did, indeed, participate in the plan as fully and completely as she could under her particular situation. Nevertheless, she remains unemployed and continues to be entitled to work disability as set forth in the May 17, 2002 Award.

K.S.A. 44-528(a) provides a mechanism for interested parties to have the ALJ review a case and determine if the Award should be revised. K.S.A. 44-528(a) provides as follows:

Any award . . . may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. . . . The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds . . . that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or

reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.

The burden of proof is on the party seeking review and modification of an award to establish a change in claimant's condition from the time the original award was entered. See *Morris v. Kansas City Board of Utilities*, 3 Kan.App.2d 527, 598 P.2d 544 (1979). The same is true here although the focus is not on Claimant's physical condition. Rather, the focus is on whether the facts and circumstances surrounding the Respondent's job placement plan constitute a change because absent some material change, review and modification is inappropriate. See generally, *Vrbas v. Wanklyn Plumbing & Elec.*, No. 158,549 (Kan. WCAB October 28, 1996).

Two years after her initial injury and shortly before the regular hearing was held, Respondent concluded it was willing to provide job placement services to Claimant. This decision was made in an attempt to minimize its work disability exposure. Implementation of the Respondent's plan, which is by law, a voluntary process, did not go smoothly. Claimant ultimately agreed to the plan, which was to last 10-12 weeks and involved mock interviews, job seeking workshops and extensive travel to surrounding towns, some as far away as 50 miles to search for work. Claimant had difficulty securing child care and also expressed concern about transportation issues in connection with the plan. Since losing her job, she had no car and her funds were limited. These were all issues that she brought up prior to implementation of the plan. Then, in July of 2002, she had a death in her family and was compelled to leave the state. When she failed to contact the individual who had created the job placement plan and indicate when she would be returning, Respondent terminated the plan and filed a request for Review and Modification.

In spite of the failure of Respondent's plan, it remains uncontroverted that Claimant has continued to seek employment "within her limitations, physically, emotionally, mentally, geographically, economically, and any other limitations which may be affecting her job search." (Award, p.3). Simply because Claimant failed, in Respondent's view, to complete a voluntary program that quite obviously did not realistically take into consideration her geographic location and other limitations, does not equate to a lack of good faith in a job search. The Board finds that the ALJ's denial of Respondent's request for modification of the previous Award was proper and is hereby affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon Frobish dated February 12, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
 Christoper J. McCurdy, Attorney for Respondent and its Insurance Carrier
 Jon L. Frobish, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director